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DONER VS. STAUFFER.

A and B agree to become partners. Each contributes $1000. The $2000 are expended in tools. materials, etc. It is evident that each of them owns every tool, every piece of material. This ownership however, is qualified by the equal ownership of the other.

This statement, however, is not a full exhibition of their rights and of the limitations of their rights. They have tacitly stipulated that neither shall dispose of the tools, materials, etc., without the consent of the other, except for joint ends. In prosecuting the business they will contract joint obligations. They intend that the whole of the partnership property shall be devotable to the reduction and extinction of these obligations. If A could dispose of one-half the assets, and use the proceeds otherwise than in paying firm debts, the consequence would be that the firm debts would remain, in full, and B's liability for them in full, towards the creditors, would continue. B has, in other words, a lien on A's interest in the goods for the purpose of securing the application of its value to the payment of his share of the debts, for which he, B, is also liable. A has a similar lien on B's interest.

With this lien, however, the disposal by A of that part of his share in the firm property that will remain after, in the exercise of it, the firm debts have been paid, does not in any manner interfere. While he has no right to transfer a firm chattel to his creditor, to pay his private debt, or otherwise to use it for his private benefit, he has the right to assign what will be his residuary interest, after the winding up of the business, and the payment by him of so much of

the debts as he, relatively to B, should in equity pay, to whomsoever he will, and for whatsoever purpose. This legal fact was expressed by Gibson C. J. in Doner v. Stauffer[1], thus: "It is settled by a train of decisions that the joint effects belong to the firm, and not to the partners, each of whom is entitled only to a share of what may remain after payment of the partnership debts."

Since each partner is thus entitled, his individual creditor is allowed to levy upon and to sell, in execution, this residual share. He cannot sell, his creditor cannot in execution sell, any chattel of the firm; his creditor cannot, by attachment, appropriate any debt due the firm. The creditor can seize and apply to his debt only the eventual interest of his debtor, the single partner, therein;[2] a principle which the Act of April 8th, 1873[3] recognizes, in providing for a form of *fi. fa.* when the object is to levy upon a partner's interest.

When then, the creditor of a partner levies on his interest in the firm, he does not levy on any chattels of the firm; or on any of its property. The chattels are not bound by his *fi. fa.*[4] They are not sold on the *fi. fa.* After the sale, as before, they remain the property of the partners, A and B. All that the execution vendee has bought is A's share in the property, after all joint liabilities have been paid, and it is clear that what he has not bought, remains the property of A. and that the liabilities are also $2000.

Let us suppose that the assets are $2000, A and B have each a right that these assets shall be applied to these debts; A, that neither B nor any creditor of B, shall divert his undivided half, and B, that neither A nor any creditor of A, shall divert his undivided half. The consequence is, that, at the sale on the execution of A's creditor, no one who knows the state of the firm, will pay for A's interest, anything, for he will get nothing by his purchase. He will not obtain the chattels, or the right even to take them into possession.

A portion of the property of A has evidently not gone to the execution vendee. A remains liable for all the firm debts. He has a right that these firm debts shall be reduced by the application to them, not of B's share merely, but of his own share, of the joint property, for this share, so far as needful to pay these debts, has not been sold from him. But the retention by A of this share, is strangely overlooked by Gibson C. J. in Doner v. Stauffer. Speaking of the sale of A's interest in execution, he remarks, "it would have passed the in-

[1] 1 P. & W. 198.

[2] Knox v. Summers, 4 Y. 477; Ward's Appeal 81-½ Pa. 270; Baker's Appeal, 21 Pa. 76; Deal v. Boque, 20 Pa. 228; Darburrow's Appeal, 84 Pa. 404; Smith v. Emerson, 43 Pa. 456; Vanikev. Rosskam, 67 Pa. 330; Gregory's Appeal, 4 Penny. 221; Oliver's Estate 136 Pa. 43.

[3] P. L. 65; P. & L. Dig. 3398.

[4] Smith v. Emerson, 43 Pa. 456; Cf. Deal v. Bogue, 20 Pa. 228.

terest of the partner (A) subject to the equity of his co-partner, and the execution creditor would have been entitled to the price." It is clear that it would not pass "he interest of the partner." It would pass a fraction only of his interest, which might be considerable or inconsiderable according to the ratio of the firm's assets to its debts. Indeed, he himself shortly before remarked, "the execution creditor sells, not the chattels of the partnership, but the interest of the partner encumbered with the joint debts;" not, be it noted, encumbered with the other partner's equity. If the chattels themselves were sold, or A's undivided half of them, subject to B's equity only, then it would follow that if the purchaser tendered to B one-half of the firm debts, he would become a tenant in common with B of them; i. e. he would extinguish B's partner's lien, a right which no case has recognized, and which is impliedly denied by Doner v. Stauffer and other decisions.

If then, on the sale in execution against A only a part of his interest in the goods is sold,the right viz., to what shall remain of them or of their value, after the satisfaction out of them, of firm debts, for which he still remains liable, the purchaser paying not the value of A's share of the goods, but of this residual and contingent part of that share, the goods remain, after the sale, affected not merely by B's right to apply them to the joint debts (a right known, so far as it affects A's interest, as the partner's lien) but also by A's right to have at least his own undivided half so applied. He still has property in the goods, which should be protected in some way both as to his late partner, B, and to others. If B retains possession of them as he may, (though, since the firm is dissolved, there is no apparent reason for giving to B rather than A the right of retention) he does so, subject to the duty to apply them according to the original tacit or express contract when the partnership was formed. If he should consume them himself, if he should sell them and use all the proceeds, the part representing A's interest, as well as that representing his own, the man with an unsophisticated conscience, would say that he had been guilty of a breach of trust. It would be with some amazement that he would learn that B can not only do this very thing but that the Courts, if Doner v. Stauffer has its way, will do it for him.

Let us suppose, after the sale in execution against A, the goods remaining with B, that a creditor of B issues execution against him, and levies on these goods. What will happen? Will the right of A, who is still liable for the firm debts, to have B's half of the goods applied to these debts, be respected? No. The Courts punish him for having a fragment of his interest sold in execution, by enlarging the right of the co-partner, and assisting him to withdraw his share of the

goods from application to joint debts; in other words, they say that A has lost the partner's lien. But this is far from being the worst. If we are to take Gibson C. J. seriously (and he has been followed in later decisions[1]) the first sale, viz., that on the execution against A, passed A's interest (not part of it,) subject to B's equity or lien, "But this equity," on a subsequent execution against B, "together with the remaining interest of the other partner (B) would have passed by the succeeding sale to the same purchaser:[2] the execution creditor in that instance also taking the proceeds." He imagines that different purchasers had bought at the sales, but repels the idea that in that case, the goods could be followed by joint creditors. He is confident that these creditors could not follow the goods, if the same person had bought at both execution sales. It is plain, we think, that C. J Gibson intended to say that the purchaser at the second sale, bought the goods themselves, and not simply B's interest in them; that is, the entire interest of B, and the entire former interest of A. Complete ownership passed to the purchaser on the execution against B.[3] It is singular that in the former execution sale, only A's residual interest passed, and that on the later execution against B more than B's residual interest passed. This, however, is not important. What is important is, not merely that, when this full interest in the goods is sold, on the execution against B, A's right to have B's share applied to partnership debts should be ignored, on the ground that he had forfeited it, by being a defendant in an execution sale, but that A's as yet unsold interest in the goods should be applied, not to him, or to his creditors, but to B's creditors.

We have supposed that the assets of the firm were worth $2000; that the debts were also $2000; and therefore that A's residual interest sold on the first execution for practically zero; e. g., for five cents. The later sale, on the execution against B, disposes of the goods themselves, and brings $2000; the whole of which is applied to B's debts; that is, $1000 of A's property has been taken from him, and given to B. And this iniquity has been performed, not by B, but by learned justices and venerated jurists. If the firm assets had been $10,000 or $1,000,000 the result would have been similar. $5,000.00

[1] Sharswood, P. J., was not so obsequious in Brenton v. Thompson, 20 Leg. Int. 133 (1863).

[2] In the case the same person bought at both sales. The sameness of the purchaser was immaterial.

[3] In McNutt v. Strayhorn, 39 Pa. 269, A assigned his *interest* in the firm for the benefit of his creditors. B, the next day, assigned his interest in the firm for the benefit of his creditors to the same person. It was held that the result of these two assignments was to transfer the *chattels* of the firm to the assignee, so that creditors of the firm could not afterwards levy upon them, and this was decided, while the court refused to decide whether the result would be the application of the property to individual creditors.

or $500,000 of A's property would have been taken by the courts and given to B's creditors; that is, to B. When principles are invented and then manipulated so as to produce such egregious results, the ordinary man must stand aghast at the pretentious claim that the law, (another name for the lucubrations of the courts) is the "perfection of reason." Here, at least, the perfection of unreason rather, let us say.

No practical objection can be made to the policy that the sale on the execution against B should pass the full title to the goods to the purchaser. They ought to have been retained by B, for the purpose of selling them, in order to pay firm debts and the sheriff may be regarded as doing what he should have done. But, why is the fund produced by it taken from the firm creditors? Because, say the courts, they have no right to payment out of specific goods, although they once were firm goods. Very well. Why then, was not one-half of the product or so much of it as equals one half of these debts paid to A, and the remainder of one half of the fund, if there was any remainder, to the purchaser at the sale in execution against A? This purchaser bought the right to the residuum of A's one half, after the debts had been paid. Why cheat him of it? He did not purchase the rest of A's one half. Why cheat A of this rest? A's principal interest in the goods was left unsold, in order that it might be applied in his relief to the firm creditors. Why take it from him, he still remaining liable for these debts, and give it to B?

Procedural reasons cannot be alleged as an excuse for this monstrous result. Had the interests of the two partners been sold together, the court would in distributing the proceeds, have investigated sufficiently to ascertain the respective interests of the partners, as was done in Doner v. Stauffer, and several later cases. An auditor could be appointed, who might ascertain the debts of the firm. If, refusing to hear those who had no "lien" on the fund, a refusal, for which under the circumstances, there would be the justification of precedent only, the court declined such investigation, what hinders its awarding the money, as in other cases, when the fund exceeds the lien, to the owners of the chattels whose sale produced it, viz., to A, and the vendee of A's partial interest, and to B? Much more difficult things are undertaken by courts in the administration of justice.

There is however a remarkable deviation from the principles laid down, when the sales of A's and B's interests take place simultaneously. It is true that in Doner v. Stauffer, Gibson C. J. argues that there is no difference between successive sales and simultaneous sales of these interests, but he proceeds to show that there is a very material difference. If the sale on the execution against A, preceded

that on the execution against B, the effect would be to give to the purchaser at the first sale only A's share in the excess of the value of the assets over the liabilities, and to A's creditor, and A himself, only the price of this excess, but, if a sale on an execution against B occurs at the same time, then, strange to say, A's creditor and A are entitled to one half of the proceeds of the sale, and B's creditor and B, only to the other half[1]. The accident of some creditor of B issuing *fi fa.* in time to cause a coetaneous sale of his and his partner's interests may determine whether A and his creditors shall get nothing, or a million dollars! If the assets are worth two millions of dollars, and the debts amount to two millions, and the sale on execution against A is made before that on the execution against B. A's vendible interest is worth ½ of $2,000,000—$2,000,000 or 0; whereas, if the sale on the execution against B occurs at the same time, A's vendible interest is worth one half of $2,000,000 and his execution creditors and he will get $1,000,000. Principles and methods of procedure that make such a result possible are self-condemned.,

It is well here to advert to a different interpretation which some jurists of distinction have put on Doner v. Stauffer. At the beginning of his opinion C. J. Gibson remarks that nothing else can be sold, on an execution against a partner for his personal debt, than his "share of what may remain after payment of the partnership debts." Later, he states that the interest of the partners, "encumbered with the joint debts" is sold. Strictly interpreting this last expression, the views are inconsistent. To sell the interest of the partner A, encumbered with the joint debts, would be to sell the interest with the risk that the lien of the other partner B might be asserted in behalf of joint debts, but also with the possibility that it would not. If B chose not to enforce the lien, if for any reason he lost the lien, as by a subsequent sale of his interest for private debts, the purchaser of A's interest would hold it free from this lien.

A consequence would be, as Rapallo J. points out, in Menagh v. Whitwell, 52 N. Y. 146, that, by an act done by B, after the sale, the interest he acquired might be greatly increased in value. Let us suppose that the assets are worth $200,000, that A and B are equal partners, and that the debts of the firm are $150,000. The share of A in the assets, is $100,000, but B's lien on them, if asserted, will leave only $25,000 to represent it. Should however, B not assert the lien, as by suffering a later sale of his interest for a private debt, the firm creditors will lose all right of access to the fund, B will have lost

[1] This result of simultaneous sales has been recognized later; *e. g.*, in Kelly's Appeal, 16 Pa. 59; Coover's Apeal, 29 Pa. 9.

his lien in respect to these debts, and the vendee of A's interest who paid perhaps, less than $25,000 for that interest will get $100,000. Meantime A continues liable for all the debts of the firm; his property intrinsically worth $100,000, has been taken from him for $25,000, on the pretext that it can be sold again, for the firm debts, and yet, by an act over which he has no control, it is not sold for the debts, and the power to sell them is lost. No wonder that the judge characterizes this result as an "injustice" and an "absurdity."

A similar interpretation seems to be put on C. J. Gibson's position by Sharswood, J. in his MSS lectures at the University of Pennsylvania. "The practical operation of the doctrines set forth in the opinion in Doner v. Stauffer" he remarks, "would be that the purchaser, though buying an encumbered title, under the first execution, (against A) by the legerdemain of a second sale under an execution against the other partner (B) is thereby vested with an absolute unencumbered title without paying for it, or what is worse, if the second purchaser is a different person, he gets a clear title, and by the same title, clears the title of the first purchaser. Thus, by this process, the separate creditors of the partner last sold out, get the full price of his share discharged of debts, though he may be entitled to little or nothing after the debts are paid, and his partner's interest which has been sacrificed by a sale incumbered with an uncertainty, may be by far the largest. A decision to put the interest of the partners as well as the joint creditors, so completely at sea, to the mercy of the winds and waves, I think, I hope at least, will never be made."[1]

By this interpretation, Gibson, C. J., is made to teach that the share of A in the partnership assets is passed by the sale on execution against him, subject to the other partner, B's, lien on it; a lien which may afterwards be lost, by the act of B, without co-operation of A. The cases, however, hold explicitly, that A's interest as against the partnership, is simply the right to an account and, that this is all that a sale of it by him, or by an execution against him passes. Gibson C. J. states that "the joint effects belong to the firm, and not to the partners"; i. e. he imputes a quasi-corporate status to the partnership and holds that the partners have only a share in a residuum, like that of the stockholders in a corporation. This view being probably the one that Gibson C. J. intended to assert, it follows as we have said, not that A's undivided half in the chattels of the firm is sold on the execution against him, burdened with a mere lien of the other part-

[1] In Brenton v. Thompson, 20 L. I. 133, Sharswood, P. J., decided that a sale of a partner's interest did not destroy his equity to have the chattels of the firm applied to firm debts, despite Gibson, C. J.'s, dictum to the contrary.

ner for the debt, but that only the half of the difference between the assets and liabilities is sold. The other portion of A's interest remains unsold.

In order to avert consequences so absurd and abhorrent as those above indicated, several things might be done.

1. The principle that, on a sale in execution against a partner A, his residual interest only, can be sold, might be abandoned. The abandonment would involve the loss by the sale of the other partner, B's, lien. But, the present system destroys A's lien by the sale. If. A being an equal partner, his half interest in the goods levied on, were sold, their full value would be brought.

2. If B's lien is too sacred to be thus sacrificed, it should be held that neither A's lien, nor the whole of his interest, when there are firm debts, is lost by the sale on an execution against him, and that B must use the assets, his own share of them as well as A's, in paying partnership debts, so that a sale of his interest. would pass only a residual interest, and the goods would remain, in the control of A and B, for the purpose of sale in satisfaction of firm debts.

3. If it is preferred that control of the goods should on the sale of A's interest, pass to B, and that a sale on execution against B, should pass the goods, let the proceeds be administered under the court's direction so, that they shall be first applied to firm debts; the balance divided ratably with the shares of the partners; A's share divided between the purchaser at the execution against him and A; and, since, at the second sale, the purchaser has the goods, all that he expected to get, B's half paid to his execution creditor, if his debt is so large; if not, the balance paid to B. If the court is unwilling to abandon its notion that the second sale has destroyed all lien for partnership debts, then let the proceeds be divided between A and B, in the ratio of their shares in the firm; A's share of the debts ascertained, and so much of his share of the fund paid to him, as would pay his half of the debts, and the remainder of his half paid to the purchaser at the first execution sale, of this remainder. Let the other half be paid to the execution against B, if there is any, and any residue be paid to B.

It would be better still, to regard the sale in execution against B, as Sharswood J. does, as passing only the same kind of an interest as did A's; in which case, the goods themselves would remain unsold. Then B's creditor would by his execution, make no more than A's creditor, by his, though no injustice is inflicted by this dissimilarity.

WILLIAM TRICKETT.

MOOT COURT

MECHANICS & FARMERS' BANK vs. ALBANY EXPRESS CO.

Common Carrier—Theft—Insanity of Servant—Act of God—Destruction of Bank Notes—Measure of Damages.

STATEMENT OF THE CASE.

The Albany Express Co. receives at Buffalo a package of bank bills sealed up and directed to the Mechanics and Farmers Bank in the city of Albany. The package purported to contain $10.000, and when it was delivered into the hands of the express company did contain that amount. The package arrived in Albany and was delivered at the banking house of the Mechanics and Farmer's Bank apparently the same as received. On opening it $3,000, part of it, was found to be wanting, and paper substituted in its place. On inquiry it is ascertained that the missing money was all in Mechanics and Farmer's Bank bills and that the same were taken from the package at Syracuse by a person in the employ of the express company while in a fit of mental derangement, suddenly and for the first time occurring, and that the bills had been burnt by him while so deranged. The express company deny all liability and the bank bring their action.

Smith and Cohen for the plaintiff.

An Express Company is liable as insurer for loss of goods intrusted to it for transportation. Leonard vs. Hendrickson, 18 Pa. 40; Verner vs. Sweizer, 32 Pa. 208; Armstrong vs. Express Co., 159 Pa. 640.

Thompson and Memolo for the defendant.

Carrier excused by Act of God. Walpole vs. Buge, 9 Am. Dec. 427; Penna. R. R. Co., vs. Henderson, 51 Pa. 315. No recovery can be had by bank for the bills totally destroyed. Hagerstown Bank. vs. The Adams Express Co., 45 Pa. 419; 6 Wendell 379.

OPINION OF THE COURT.

LABAR, J.:—It is a well settled rule of law that Common carriers are insurers of goods carried in that capacity, against all losses or damage, except those caused by the act of God, the public enemy, act of the shipper, public authority, and the inherent nature of the goods.

Hale on Bailments and Carriers, page 351.

The Express company is a common carrier and was upon receipt by it of the package of bank bills directed to the plaintiff bank bound by law to deliver the same to them.

Verner vs. Sweitzer, 32 Pa. 208.

Where the goods do not arrive at their place of destination or arrived in a damaged condition, or are not all delivered, this is a prima facie breach of his warranty for which the Carrier is liable.

In the case at bar when the express Company received the package it purported to contain bills representing $10,000. On delivery to the bank it was found that $3000, part of it, was wanting. These facts alone are sufficient to show liability on the part of the Express Company unless it shows that

the loss falls within one of the excepted perils.

Defendant contends that the sudden fit of mental derangement of their agent was such an act of God as to relieve them from all liability. We are of the opinion that such circumstances do not come within the meaning of the phrase "Act of God." An act of God is such an act of nature, entirely unconnected with any human agency, and it must be the exclusive cause of the loss or the carrier will be liable.

Hale on Bailments and Carriers, p. 358.

He is an insurer against such perils as it is his duty to provide against, and among these are such as arise from the use of defective or inadequate instruments of carriage. and from the employment of incompetent, negligent or criminal servants.

Willock vs. R. R., 166 Pa. 189.

Farnham et al vs. R. R. Co., 55 Pa. 53.

What is the measure of damages to be allowed? The amount of damages is to be estimated from the character, quality and quantity of the goods and the nature of the injuries shown by the proof.

Am. and Eng. Enc. of Law, vol. 5 p. 377..

By the facts of the case the notes stolen which were all of the plaintiff's own bills have been totally destroyed so that they can never be presented to the bank for payment. In Hagerstown Bank vs. Adams Express Company, 45 Pa. 419, the rule was laid down that where bank notes are totally destroyed the owner thereof can recover their value from the bank. But in that case the notes were not destroyed by the agent of the Express company until after the Express Company had paid the amount of the bills to the Bank. The Court in allowing the Express Company to recover based its decision upon the grounds that the title to the notes had passed to the plaintiff and that the notes had been totally destroyed. The lower court said in his charge to the jury which was affirmed by the Supreme Court that "had the destruction of this money been known before the company paid the bank we cannot doubt of its right to resist payment." It follows from this that if the Express companyhad paid to the bank the amount of the bills stolen, that upon proof of their destruction the Express company could have recovered the same from the bank.

No principle is better established nor more necessary to be maintained than that bank notes are not money in the legal sense of the word. They are merely promissory notes for the payment of money.

Gray vs. Donald, 4 Watts 400.

Therefore the bank has suffered no serious loss by reason of the failure to deliver and the destruction of the notes and their damages, if any, are only nominal.

Substantial damages can be recovered for a breach of contract only on proof that actual damages resulted.

P. & L. Dig. of Dec., Vol. 3, Col. 4585.

The defendant is guilty of a breach of contract for the non-delivery of these notes and wherever there is a breach of an agreement or the invasion of a right, the law infers some damages, and if no evidence is given of any particular amount of loss, it gives nominal damages by way of declaring the right.

Am. and Eng. Enc. of Law, Vol. 8, p. 553.

Judgment for plaintiff for nominal damages.

OPINION OF THE SUPREME COURT.

The express company, a common carrier, became a carrier of the Bank bills. Schouler, Bailments, 369, 3d Ed. The abstraction and destruction of the $3000, were performed by the servant of the company, at Syracuse. He was insane, but that was no excuse for his act. He was liable, for damages occasioned by it.. Mutual Fire Ins. Co. vs. Showalter, 3 Superior, 452; Sheppard vs. Wood, 1 Lanc. L. R. 175; 9 P. & L. Dig. 14558. It would follow that the company would be liable for it to the Bank. The principle is not too broad that "any loss on which a carrier might found his action for damages, because of another party's wrong," cannot be attributed to an act of God. Schouler, Bailments, p 417.

Had the bank packed up blank pieces of paper, and sent them by the express, the company would have been bound to transmit them safely, and though this paper had no palpable value, nominal damages could have been recovered.

The $3000 bills destroyed, were the promises to pay of the plaintiff. They were worth as the bank's property, not the $3000, but still something. The bank could have reissued them, and thus keeping them in circulation, have earned the interest on that sum. It might cost something to have similar notes executed.

Judgment affirmed.

POLSGROVE vs. POTTS.

Contract to Convey Real Estate—Parol Evidence—Statute of Frauds.

STATEMENT OF THE CASE.

Paul Potts owned a rectangular tract of land bordering for 210 feet on Hanover Street, and extending back 150 feet. He agreed with Peter Polsgrove, in writing, to convey to the said Peter "100 feet of my lot on Hanover Street. "A week after the two marked a line 100 feet from the south end of the lot and running at right angles to the front and rear line from the former to the latter.

Oral evidence is offered to the effect that this was done to define and sell off the piece intended by the parties to be sold and bought. Still later Polsgrove threw some stones on the piece thus marked off for him with a view to laying a pavement in front of it. Potts repenting of his bargain refuses to convey though a deed to be executed by him is tendered to him with the purchase money. Polsgrove files the bill to compel conveyance.

Johnson for the Plaintiff.

It is not necessary that the consideration involve a benefit moving to the promisor; it is enough that there be a detriment to the promisee. Such was the situation in the present case. Duke vs. Smith, 14 Utah 35; Burns vs. Landus 114 Cal. 310; Bispham'sEquity, 496.

Vendor is estopped by his words, actions and silence from setting up a valid defense. Woodward vs. Tudor 81* Pa. 382; Chapman vs. Chapman 59 Pa. 214; Folk vs. Beedlman 6 Watts 339.

McAlee for the Defendant.

Specific performance is of grace. not of right., P. & L. 8558. Where a contract is uncertain eqity will not interfere to compel specific performance. H. Ammes vs. McEldowey 46 Pa. 334; Freeman vs. Stokes 4 W. N. C. 459; Ander's Estate 5 W. N. C. 78. Lee's Appeal 12 W. N. C. 138.

OPINION OF THE COURT.

SHOWALTER, J.:—The contract between Paul Potts and Peter Pols grove is rather indefinite as to the subject matter in dispute. There was an agreement reduced to writing and the only reason that a chancellor should hesitate to enforce this contract is the fact, that the land to be conveyed was not sufficiently well described.

In attempting to decide this case the court will assume, that the price was stated in the contract, that the contract was signed by the vendor and that it was then delivered to the vendee.

Is this sufficient to decree a specific performance? We think not. A chancellor can only enforce an agreement specifically where the parties have agreed upon all its terms and left nothing to the future, but mere performance. An agreement to convey a lot of ground can not be specifically enforced where the agreement fails to identify the land in question, either in terms or by reference to an existing plan but merely says "the size of the lot of ground secured or intended to be secured by the purchaser to be determined hereafter and to conform to the general plan regarding the convenience and economy hereafter to be laid out and established;" and this is the case although the lot is further referred as the piece of ground on which the purchaser now resides.

Agnew v Southern Avenue Land Co. 204 Pa. 192. In this case the court refused to decree specific performance.

If the plaintiff were compelled to rely only upon the written contract to sustain this action, he would certainly fail. He would be entitled to nothing more than damages as found in a court of law. But the transaction did not stop with the writing of the contract In pursuance thereof the plaintiff and the defendant went upon the land and measured off a certain part of it. For what reason the statement of facts does not disclose but it is only a sensible presumption, that it was to indicate the land to be conveyed. The fact that the same parties to the contract went upon the land and measured off a part of it could raise no other presumption than that the intention was to indicate the land to be conveyed. This makes the subject of the contract definite enough that a court of equity can decree specific performance.

To strengthen the position of the plaintiff, he has placed material upon the land to build a pavement. The defendant has not objected to his so doing. Certainly justice and right would not allow him to stand by without objection while the plaintiff was making improvements on the land, and then allow him to repudiate his contract. He is estopped by his inaction. The equities are all with the plaintiff. Going upon the land and measuring it off made the contract certain, and he has tendered the purchase money. This is all the plaintiff could be, in justice, expected to do.

And now, the defendant is ordered to convey the said tract of land in dispute to the plaintiff and give a good and sufficient deed therefor.

OPINION OF THE SUPREME COURT.

Potts owned a piece of land which was 210 feet long upon Hanover street, and extended back from that street, 150 feet. He contracted in writ-

ing to convey "100 feet of his lot on Hanover Street." Were the intended feet at the north end, or the south end, or in the middle, or at some intervening place? No answer is given to this question by the writing. The Statute of Frauds, requiring contracts for the sale of land to be in writing, requires that the writing shall reasonably define the boundaries and locus, of the ground. There is no such definition here; Holthouse v. Rynd, 9 Sadler, 193; Mellon v. Davison, 123 Pa. 298; Agnew v. Southern Avenue Land Co., 204 Pa. 192. Harrisburg Board of Trade v. Eby, 1 Dauph. 99. Specific performance of the contract, therefore, whether by bill in equity or by ejectment will be refused.

This writing, so defective that specific performance would be refused, might have been followed by another writing defining the ground, and the two might have been so connected by internal reference in the later to the earlier, as to be susceptible of being treated as one agreement, and enforceable. No subsequent writing was executed. The parties, two weeks after the making of the contract, marked a line 100 feet from the south end of the lot, and running at right-angles to the front and rear line, from the former to the latter. The intention of the vendor was, to allot the piece south of this line, to the vendee in performance of his agreement. But, the running of the line, and the intent with which it was done, are both established by oral evidence. The learned court below has found the writing too defective to sustain a decree for specific performance, but considering in conjunction with it, this oral evidence of definition of the tract, has awarded a decree. In this we think, there was error.

The land intended might have been later defined by a draft, as it was actually defined by the running of the line on the ground. But, the draft itself, not referred to in the writing, could not be used to supplement it. Still less could the mere running of the line. Mellon v. Davison, *supra*. The running of the line, and the intention being proved, the intended land is established, but it is established by *parol*, in defiance of the statute.

Has the contract been made enforceable by the taking of possession, the payment of the purchase money, and the making of improvements? The only possession taken, is throwing some stones on the lot, with a view to laying a pavement in front of it. How many is not shown. There may have been two, or six, or twenty, or a hundred. This surely is not a taking of possession. But, conceding that it was, we find no payment of purchase money, no making of improvements that could not be compensated for. There has happened nothing to exempt the contract from the operation of the statute.

Decree reversed, and bill dismissed.

MAHON vs. BERKELY.

Bailment—Depositum—Bailee's Lien.

STATEMENT OF THE CASE.

Mahon finds in the interior of this state an article of great value, which Berkely has lost. Mahon expends upon it both services and money for the purpose of preserving it. Berkely demands of Mahon the article, and Mahon insists that he has a right to retain it until payment of his lien for services rendered and money expended. Upon Berkely's threatening to sue him, he de-

livers up the article under protest and subsequently brings an action against Berkely for such services and money.

Keenan and Sorber for the Plaintiff.

If a chattel is taken up and preserved by the finder at some expense of both time and money and the rightful owner afterwards comes and receives, thereby accepting the benefit of the expenses thus incurred he is bound to reimburse the finder. Rudy vs. Anderson, 4 Dana (Ky.) 193; Chase vs. Corcoran, 106 Mass. 286; Edwards on Bailments 320.

Lewis and Arnold for the Defendant.

Finder has no lien for expenses gratuitously incurred in taking care of lost property. Etter v. Edwards, 4 Watts 63.

Finder has no lien on property as finder although he may have lien for reward offered. Wood v. Pierson, 45 Mich. 313.

OPINION OF THE COURT.

REED, J.—The question as to whether the finder of lost property can recover compensation for the labor and expense he may voluntarily bestow upon the property, seems never to have been decided by the Pennsylvania courts In a late case, Hendler v. Perkins, 4 Pa. Sup. 345, Judge Orlady says, "it is doubtful whether a finder of lost property can recover for labor and expenses voluntarily bestowed upon the thing found." We have a dictum, however, in Etter v. Edwards, 4 Watts, 63, to the effect that, "it is probable that a court of justice would go as far as it could towards enforcing the payment of reasonable expenses."

At common law the finder of lost goods had no lien for expenses incurred in the preservation of the article, but could claim and recover them in an action: Nicholson v. Chapman, 2 H. Bl., 254; Chase v. Corcoran, 106 Mass. 256; Amory v. Flyn, 10 Johns (N. Y.) 102; Reeder v. Anderson, 4 Dana (Ky.), 193. This rule has been followed in the following cases: Tome v. Four Cribs of Lumber, Taney (U. S.) 533; Sheldon v. Sherman, 42 N. Y. 484; Baker v. Hoag, 7 Barb (N. Y.) 113; Reeder v. Anderson, supra; Chase v. Corcoran, supra; Watts v. Ward, 1 Ore. 86. This seems to us to be the correct rule.

Hale in his work on Bailments says, "While bailees for the sole benefit of the bailor are not entitled to any compensation for their services, they are entitled to recover their actual disbursements and expenses necessarily incurred for the preservation of the deposit. This is naturally implied in the undertaking because a gratuitous act would otherwise become a burden." This rule we believe applies to those on whom as in the present case, the rights and liabilities of bailee are imposed by operation of law, as well as to those who become bailees by express contract.

It may be argued that Mahon has waived his right to recover in this action, because of his having delivered up the article to Berkely. Such is not our view of the case. He would have been liable for conversion had he retained the article: Etter v. Edwards. supra. He cannot, therefore, be said to have waived his right to bring this action.

The plaintiff here asks for compensation for services rendered and money expended. Under the decisions and principles of law as above given, we believe he can only recover for money actually spent in caring for and preserving the article.

The finder of lost goods is held to be a bailee under an implied contract of deposit: Hale on Bailments, page 39, and cases cited. If he voluntarily assumes the care of them, he is burdened with the liabilities of a depositary. In this class of bailments it is of the very essence of the contract that the

custody or service be gratuitous. We are unable to see, therefore, any reason why one on whom the relation of depository is imposed by operation of law should recover for services rendered.

We instruct the jury, from the evidence submitted, to ascertain the actual expenditures made by plaintiff, necessary for the preservation of the article, and render judgment for plaintiff for such expenditures.

OPINION OF THE SUPERIOR COURT.

When an article of value is lost, a sound policy would suggest the adoption of such principles with regard to compensation of the finder as would probably induce him to restore the article to its owner, and meantime to preserve it from destruction or deterioration. A's horse has wandered away. B sees it. The safety of the horse depends on B's taking it up, feeding it, otherwise caring for it. If he can get no compensation for his trouble and for the value of the things he expends on the horse's preservation, he will have a motive not to take up the horse, or, taking it up, not to care for it, or to adopt means to evade the search of the owner. What is true respecting the lost horse, is true respecting any other lost article of value. It would be reasonable to require the owner, if he claims and retakes the article, to compensate the finder for the trouble and expense incurred by him in its preservation. But for the finder's acts there would probably be no recovery of the thing, or, if recovered, it would be in a condition making it hardly worth recovering.

The court with some approach to unanimity, hold that the finder will have no lien on the article, for his outlays. He must, even before reimbursement, deliver it to its owner on the demand of the latter. Chase v. Corcoran, 106 Mass. 286; Wood v. Pierson, 45 Mich. 313; Preston v. Neale, 12 Gray, 222: Etter v. Edwards, 4W. 63. But, if a right to compensation is conceded to the finder, there is no appreciable reason for denying to him the remedy of a lien. When a bailment is made in order that work may be done by the bailee, a lien is given to him for the compensation. It ought not to matter whether the possession and service were the result of a contract, or not, if the law yields to the possessor who benefits the thing, a compensation. If for a contractual compensation there is a lien, there ought to be a lien for non-contractual but obligatory compensation.

The denial to the finder of the right to a lien, is however not a denial of his right to compensation; for among the cases denying the former, are some that either do not deny or expressly concede the latter. Preston v. Neale, 12 Gray, 222; Chase v. Corcoran, 106 Mass. 286. Etter v. Edwards, *supra*, while holding that there is no lien, states that, at the time of the writing of the opinion, 1835, it is as yet "undetermined" whether the finder can recover an indemnity. The Superior Court seems to think, in 1897, that the right to indemnity is "doubtful;" Hendler v. Perkins, 4 Super. 344, but it cites only Etter v. Edwards, decided sixty-two years before, which states merely that the matter is "undetermined."

No distinction is made in these cases, between the expenses incurred by the finder, and the labor expended by him in the preservation of the found property. It is difficult to justify such distinction. The labor of the finder has a market value as well as that of another whom he might hire to perform it. The distinction seems to be ignored in Chase v. Corcoran, 106 Mass. 286: Reeder v. Anderson, 34 Ky., (4 Dana) 193. If there is a finder's right to be paid for the money he has spent, we think there is a right to be paid for the

labor, supervision, services he has rendered with the same object. Some of the latter are as indispensable as the benefits procured by the outlay of money.

When a bailee receives goods for the sole benefit of the bailor, he is not entitled to compensation for his services, for he has impliedly or expressly agreed to render them gratuitously. If he received the thing in order to labor upon it, and to be paid for his labor, the bailment would be for his own benefit, as well as that of the bailor. The same policy of law that would secure to a finder, compensation for his moneys would also secure it for his labor. It is often as beneficial to the owner that the latter, as the former should be bestowed, and it is equally unjust to allow the owner to take the thing, benefitted by the labor, without recompense for it, as to take it benefitted by the labor of others, for which the finder has paid, or by the application of property to it, which the finder has spent money in procuring. In Chase v. Corcoran, 106 Mass. 286, a boat found derelict on the Mystic river, was rescued and turned to the shore. Its bottom in which were holes, and the keel of which was nearly demolished, was repaired, it was stored in the finder's barn for two winters. When it was found, it was worth but $5.00. The owner had received it from the finder, who then bringing an action for compensation, was held entitled to recover $26. No distinction was drawn between the money expended and the labor done, by the finder. Indeed it does not appear that he expended any money. The claim was for moving and repairing the boat and for the finder's care and trouble in keeping it. Cf. also Reeder v. Anderson, 34 Ky. (4 Dana) 193.

The decision of the learned court below, that the delivery by the plaintiff to the defendant, on the demand of the latter, of the article, does not preclude his recovery of compensation in the present action, is well supported by its reasoning.

It follows, from what we have said, that the judgment of the court below, on this appeal of the defendant, must be affirmed. More might have been recovered from him, under the law as we apprehend it to be. The right to complaint belongs not to him but to the plaintiff.

Judgment affirmed.

STEARNS vs. STEVENS.

Sale—Agency—Authority of Agent to Receive Payment

STATEMENT OF THE CASE.

There are three parties, Stearns, a wholesale flour dealer, Stevens, a grocer, and Stokes, a gentleman.—On the first of May 1861, Stokes called on Stevens at his store and inquired if he wished to purchase flour, informing him that Stearns had a large quantity, and would sell the kind mentioned at $8.00 per barrel, if he could sell fifty barrels together for cash, the retail market price then being $8.50 per barrel. Stevens replied that he would purchase that quantity at that price, delivered at his store. Stokes then left, and shortly afterwards called on Stearns, and informed him that Stevens wished him to send him fifty barrels of flour of a description such as he had

agreed to receive. Stearns supposing him to be Stevens' agent, and knowing Stevens to be in good credit sent the fifty barrels to Stevens' store, where they were received and disposed of. Stokes soon after called at the store of Stevens with a bill of the flour, purporting to be receipted by Stearns. Upon this forged receipted bill he received the money, and has never since been heard of. He was unknown to either party nor employed by either, further than the above facts would go to show employment. Stearns, after waiting a proper time, presented his bill and demanded payment. Stevens refused to pay, and this action is brought for the price of the flour.

Duffy and Gardner for the plaintiff.

An owner cannot be divested of his property without his consent, unless he has placed it in the custody of another and given him the apparent right to dispose of it. Barker vs. Dinsmore, 72 Pa. 427.

An agent employed to make sales on credit, has no authority by implication to collect the price in the name of the principal. Seiple vs. Irwin, 30 Pa. 513.

Lindley and Tobin for the defendant.

Defendant submitted to judgment on the authority of Barker vs. Dinsmore, 72 Pa. 427. Seiple vs. Irwin, 30 Pa. 513. McCulloch vs. McKee, 16 Pa. 289.

OPINION OF THE COURT.

ROUSH, J.:—In this case through the conduct of Stokes, a valid contract was entered into between the plaintiff and the defendant, which was partially executed. The plaintiff agreed to sell and the defendant agreed to buy fifty barrels of flour. The only thing that was necessary to complete the sale, was the payment of the purchase money; and this is an action for that money.

There is no doubt that the plaintiff delivered the flour to the person to whom he intended it should be delivered; and it was received by the defendant, as coming from the plaintiff. There was, therefore a valid delivery and the property in the flour passed to the defendant. He became, therefore responsible to the plaintiff for the value of the flour.

But did the defendant discharge himself from the obligation by paying the money to Stokes? The law is well settled that the owner can not be divested of his property without his own consent, unless he has placed it in the possession or custody of another and given him an apparent or implied right to dispose of it; Barker v. Dinsmore, 72 Pa. 427. Stokes never had the custody or possession of the flour: nor was he the agent of the plaintiff, with authority to collect the money from the defendant. An agent is a person duly authorized to act on behalf of another, or one whose unauthorized act has been duly ratified; Wolf v. Horncastle, 1 Brs. & Pal. 316. Agency cannot be implied without proof that the principal knew that the alleged agent was acting for him, or unless he ratified his act; Creighton v. Keith, 16 Phila. 130. As Stokes, was not the agent of the plaintiff, and the defendant paid the money to Stokes, without authority so to do, it follows that the defendant is still liable to the plaintiff for the value of the flour. We think that on account of said reasons, and on account of the law as laid down in Barker v. Dinsmore, 72 Pa. 427, our judgment must be for the plaintiff.

OPINION OF THE SUPREME COURT.

Stokes was not, nor did he profess to be the agent of Stearns. He knew that Stearns had flour for sale, and knew or surmised that he would sell it, quantities not less than fifty barrels. at $8.00 per barrel. He gave Stevens

this information, who, possibly believing (though this is not certain) that Stokes was an agent of Stearns, authorized him to inform Stearns that he would take fifty barrels at the price named. Stokes informed Stearns, who sent the flour. It was received by Stevens, who thus, became indebted to Stearns, to the extent of $400.

The question is, has this debt been paid? Stokes, soon after the delivery of the flour, called on Stevens with a "bill of the flour, purporting to be receipted by Stearns." The bill is described as "this forged receipted bill," but, whether the bill had been made out by Stearns, and whether the receipt only, was forged, is not clear. Nothing proved warrants us in inferring that Stearns gave any authority to Stokes to collect the money. Nor had he "held out" Stokes as having such authority. Stokes' first act was done, on the impulsion of Stevens. If he was the agent of either the plaintiff or the defendant, he was the agent of the latter. He orders the flour in Stevens' name, and it is sent. He is not authorized to act for Stearns in collecting the money. Stevens has given $400 to one to whom Stearns has done nothing to authorize him to assume that he, Stearns had given any authority to receive it for him. He has taken the risk of its not being handed over to Stearns.

Even if Stokes had been an agent to procure orders for flour he was not an agent to make sales. The orders had to be communicated to Stearns. He had no authority, therefore, to receive payment; 1 Am. & Eng. Encyc. 1016. Nor, had he been agent to make sales, could he have had implied, authority subsequently to collect the price if the sales were made on credit. Seiple v. Irwin, 30 Pa. 513; 1 Am. & Eng. Encyc. 1015, 1016. Stearns, it appears, was induced to sell the flour, by his knowledge that Stevens was in "good credit," and, it is found that, "after waiting a proper time," he presented his bill and demanded payment. The sale was therefore on credit. Had Stevens therefore, had a right to think Stokes agent of Stearns to make the sale, he did not have the right to believe him authorized to receive payment later.

The decision of the learned court below has properly disposed of the case.

Judgment affirmed.

HARRY STOKES v. SAMUEL THROPE.

Fee Tail Special—Effect of Act of Apr. 27, 1855 on Estates Tail.

STATEMENT OF THE CASE.

Wm. Staples devised land to Mary Stokes, "and the heirs of her body of her present husband." She had two sons by him still living. On his death she married again and by her second husband, John Barnard, had two sons. Harry Stokes is the oldest of the children. She dying the younger child by the first marriage and the children by the second, claiming to be co-heirs, have taken possession of three undivided fourths. This is ejectment by Harry to obtain sole possession.

Barner for the plaintiff.

Any explanation attached to the word "heirs," which acts as a limitation of the heirs general, will take the case out of the Rule in Shelley's Case, Hoge v. Hoge, 1S. & R. 143; McCann v. McCann, 197 Pa. 452, Jones v. Jones, 201 Pa. 548.

Bowman for the defendants.

The Act of April 27, 1855, P. L., 368, Sec. 1, provides: "Whenever hereafter by any gift, conveyance or devise, an estate in fee tail would be created according to the existing laws of this state, it shall be taken and construed to be an estate in fee simple,"etc.

It is not requisite to the creation of an estate tail by will, that the testator should use the words "heirs of the body." Wall v. Vandegrift, 3 Binn. 374.

OPINION OF THE COURT.

LAUB, J.:—The plaintiff contends that the estate given to Mary Stokes was simply a life estate with remainder to the two sons of her body with her husband who was then living.

We are unable to accept this view. The devise was to Mary Stokes, "and the heirs of her body of her present husband." Such language seems to create an estate tail. A limitation in such technical language as to one "and the heirs of his body," will even in a will create an estate tail, except where it is clear from the context that the testator intended to give some other estate. Duer v. Boyd, 1 S. & R. 203; Phila. Trust Etc., Co.'s Appeal, 93 Pa. 209.

As the word "heirs" is necessary to create a fee, so in further limitation of the strictness of the feodal donation, the word "body" or some words of procreation are necessary to make it a fee tail, and ascertain to what heirs in particular the fee is limited. Jones v. Jones, 201 Pa. 548. Where the intention of the testator has been ascertained, that the remaindermen are to take as heirs, general or special, then the Rule in Shelley's Case applies without exception and converts the estate into one of inheritance. The actual intention of the donor on this question is of no weight whatever; in fact, a very clear expression that the rule shall not apply and the first taker shall have but a life estate is to be disregarded, and the life estate combines with the remainder into an estate in fee or in tail. Carter v. McMichael, 10 S. & R. 429; Auman v. Auman, 21 Pa. 343.

In Carter v. McMichael, supra, the devise was to a son for life "and after his decease to the heirs male of the body of my said son lawfully to be begotten, and the heirs and assigns of such heirs or heir male forever" and Tilghman, C. J., held that the son took an estate in fee tail.

In George v. Morgan, 16 Pa. 95, the devise was to a son "during his natural life, and after his decease to the heirs of his body lawfully begotten and to their heirs forever," and Bell, J., held the son took an estate in fee tail. In Lehndorf v. Cope, (Ill.), 13 N. E. Rep. 505, the devise was in almost the very same language as in the devise in question. The devise in said case was to M. "and her heirs by her pdesent husband, H." and the court held that M took an estate tail.

But it might be said that the testator did not mean to give the first taker an estate tail. Perhaps he did not. But he has used words which in law mean nothing else. If he intended to give but a life estate, *voluit non dixit*, we must take what he said, not what he meant. Such was the language used by Black, J., in Bender v. Fleurie, 2 Gr. 345.

Since the Act of April 27, 1855, P. L. 368, estates tail are converted into estates in fee. Carroll v. Burns, 108 Pa. 386. Section one of said act provides, "Whenever hereafter by any gift, conveyance, or devise, an estate in fee tail would be created according to the existing laws of this state it shall be taken and construed to be an estate in fee simple and as such shall be inheritable.

The purpose of said Act is to convert words of entailment in estates thereafter created, into words of general inheritance in fee, and thereby repeals the statute *de donis conditionalibus*. Price v. Taylor, 28 Pa.95. While a fee tail can no longer subsist, it may still be created, to be by force of said Act transformed into a fee simple. Seybert v. Hibbert, 5 Pa. Super. 538.

In view of these authorities we hold that the devise to Mary Stokes gave her an estate tail, which the Act of Apr. 27, 1855, P. L. 368, transformed into a fee simple. Since this is so, on the death of Mary Stokes, intestate, the property in question did not descend to the plaintiff and his younger brother to the exclusion of the children of Mary Stokes by her second husband. As the statement of the case informs us that the plaintiff is bringing this action to obtain sole possession of the land we are constrained to direct a verdict for the defendants.

OPINION OF SUPREME COURT.

The language of the will, at common law, created a fee tail special. The first section of the act of April 27th, 1855, 1 P. & L. 1882, requires that whenever any devise would according to the then existing law, create an estate in fee tail, it shall be construed to be an estate in fee simple. No distinction is made between fees tail general and fees tail special. But for this act, the land would, at the death of Mary Stokes, have passed to Harry the oldest son, to the exclusion of his whole brother. The half-brothers could in no event have taken. But the act of 1855 has converted what would have been a fee tail special, into a fee simple. The land descended equally to all the sons. Schrecongost v. West, 210 Pa. 7.

Judgment affirmed.

DEMPFOLD vs. HARBISON.

Lien—Sale of Land by Judgment Debtor—Revival of Judgment to Terre-Tenant—Sheriff's Sale.

STATEMENT OF THE CASE.

Dempfold had a judgment against Hartman. Before 5 years ran by Hartman conveyed his land to Harbison, who took possession. Dempfold then obtained within the 5 years a confession of judgment of revival to which Harbison was not a party. Seven years after the recovery of the original judgment Dempfold issued an execution and caused a Sheriff's sale of the land, becoming the purchaser. This is ejectment to obtain possession.

Clark for the Plaintiff.

Cited Lusk vs. Davidson, 3 P. & W. 229.

Thompson for the Defendant.

The revival of a judgment to which the terre tenant is not a party will not continue the lien as to him. Armstrong's Appeal, 5 W. & S. 352; McCoy vs. Clark, et al., 82 Pa. 457.

OPINION OF THE COURT.

COHEN, J.:—A judgment lien had its origin in statutory law, at common law nobody had a lien on the debtor's land by virtue of a judgment except the King. The first acts creating a lien on land for the satisfaction of a judgment were statutes of Westminster 2d, 13 ed. 1, C. 18, which gave the creditor the right to hold a moiety of the debtor's land until the debt be satisfied. The later statutes have prescribed the number of years the lien is to run together with its kind or character of the judgment, with reference to its capacity for creating a lien, together with its revival.

In the case of a terre-tenant, who is one who has an estate in land, coupled with the actual possession, which he derives mediately or immediately from the judgment debtor while the land was bound by the lien, there are two modes of revival, (1) by agreement between the parties and terre- tenant, (2) by writ of scire facias.

In the case at bar one Dempfold had a judgment against Hartman. Before the statutory period of five years had elapsed he conveyed the land to Harbison who took possession. Dempfold then obtained within the five years a confession of judgment of revival from Hartman to which Harbison was not a party. Seven years after the original judgment was recovered Dempfold issued an execution and caused a sheriff's sale of the land, becoming the purchaser himself, and now brings this ejectment.

It is evident from the facts in this case that it does not come within the provisions of the act of June 1, 1887, which provides that "no judgment shall continue a lien on such real estate for a longer period than five years from the date on which said judgment may be entered or revived, unless revived, within that period, by agreement of the parties and terre-tenant, filed in writing and entered on the proper docket." This has not been done here. The confession of judgment by Hartman to Dempfold was not participated in by defendant, the terre-tenant, and consequently has not been properly revived. But it might be said that Harbison's deed was not recorded and should suffer for his laches, because it was the usual means by which plaintiff might find out that there was a terre-tenant. But he might, in order to be sure, have issued a sci. fa. in neglect of which he has chosen to risk the other.

The terre-tenant or owner, at the time when this revival was sought, was the person most interested in the proceeding, the judgment-debtor being merely nominal, having parted with his interests. In the act of 1798, the terre-tenant is the person first named on whom the writ is to be served, which shows that his connection with the revival was deemed of primary importance.

The act of April 16, 1849, provides that "in all cases when a judgment has been or shall be regularly revived between the original parties, the period of five years, during which the lien of the judgment continues, shall only continue to run in favor of the terre-tenant from the time that he or she has placed the deed on record: Provided, that this act shall not apply when the terre-tenant is in actual possession of the land bound by such judgment.

We, therefore, hold that the revival was not according to the act of June 1, 1887, (P. & L. vol. 1. col. 2474) and as a consequence there was no revival according to law, because the terre-tenant was not a party to their agreement. And according to the act of April 16, 1849, (P. & L. vol. 1. col. 2478) whirh regulates the time from which the lien shall begin to run against the terre-tenant excludes cases where the terre-tenant is in possession, which is the case at bar.

We also hold that the judgment given to Dempfold by Hartman ceased

to exist as a lien on the land in question not being regularly revived within the statutory period, and when it was sold by the sheriff the sale was illegal we therefore conclude that no title passed to Dempfold and as a consequence he cannot recover.

Armstrong's Appeal, 5 W. & S. 352, we think sustains this conclusion.

Judgment for defendant.

OPINION OF SUPREME COURT

The 8th section of the act of April 16th, 1849, 1P. & L. 2478, made a revival against the defendant efficacious as against a terre-tenant who was not a party to it, unless his deed was of record or unless he had possession. If he was not in possession, *and* if his deed was not on record, the creditor had five years from the time when the deed might be recorded or possession taken, in which to revive against him.

The act did not apply, when the terre-tenant was in actual possession of the land. In that case the legislation prior to 1849 was applicable.

The act of June 1st, 1887, 1 P. & L. 2474 has reenacted section one of the act of March 26th, 1827, adding to it however, the words "No proceeding shall be available to continue the lien of said judgment against a terre-tenant, whose deed for the land bound by said judgment has been recorded except by agreement, in writing, signed by said terre-tenant, and entered on the proper *lien* docket, or the terre-tenant or terre-tenants be named *as such* in the original *scire facias.*"

This act repeals that of April 16th, 1849, and restores the act of 1827, with the modification that when a terre-tenant's deed is on record, at the time of the attempted revival, he must be named as such in the *scire facias*, or if an agreement is employed he must sign the agreement. Uhler v. Moses, 10 Super. 194.

In the case before us, Harbison was in possession of the premises when the revival occurred, but his deed was not on record. He did not become a party to the agreement. Under the act of 1827, which is, through its repetition in that of 1887, still in force, the amicable action, not signed by the terre-tenant, did not revive the judgment. Armstrong's Appeal, 5 W. & S. 352, 1 Liens. 253.

The sheriff's sale on the judgment against Hartman, took place when that judgment had lost its lien. The sale did not extinguish the ownership of Harbison. The purchaser is not entitled to the possession.

Judgment affirmed

WM. HARMON vs. FREDERICK KELSO.

Negotiable Instruments—Warrant of Attorney to Confess Judgment

STATEMENT OF THE CASE.

Kelso made a note at 4 months for $1000 payable to Samuel Addison or order, which contained a warrant of attorney to confess judgment. Judgment was confessed on it, one month after it was delivered; but in some way the note was taken from the prothonotary's office and, before maturity negotiated by Addison to Harmon. After the entry of the judgment, but before the maturity of the note Kelso paid $800 to Addison, having no notice that Harmon or any one had the note. Harmon sued for the $1000.

Lindley for the plaintiff.

Judgment was asked based on act, I, Sec. 1; Act. IV, Sec. 51, 52 and 57, of the Negotiable Instruments Act, 1901. The universal practice in this

state has been to enter judgments upon warrants of attorney before maturity of the debt recited therein merely for the purpose of security by way of lien. Integrity Ins. Co. vs. Raw., 153 Pa. 488. Volkenard vs. Dum, 143 Pa, 525.

Gardner for the defendant.

A note with warrant of attorney to confess judgment annexed is negotiable, McIntyre vs. Steel, 1 W. N. C. 494; Osborne vs. Hawley, 19 Ohio 130.

OPINION OF THE COURT.

MEMOLO, J.—This is an action of assumpsit on a note by Wm. Harmon against Frederick Kelso.

Harmon is a bona fide purchaser for value of a note made by Kelso for $1000.00 payable to Samuel Addison or order at 4 months. The note contained power of attorney to confess judgment. Judgment was accordingly confessed one month after delivery, but the note in some way was stolen from the prothonotary's office after judgment was confessed and before maturity and negotiated by Addison to Harmon. Kelso not knowing who had the note paid Addison $800.00, Harmon now sues for the value of the note.

It may seem rather harsh to enforce payment upon Kelso twice for the same note, but public policy demands that under the existing circumstances Kelso be liable, because if he were not, having discharged the note, it would lay down the principle that every man coming into the possession of a negotiable instrument which this is, would have to look back and see that the title of the one from whom the present holder derived it, was good, and this would be too cumbersome and slow in the commercial world.

That it is negotiable, is clear, since it is 1st, In writing and signed by the maker or drawer. 2nd, Containing an unconditional promise or order to pay a sum certain in money. 3rd, Payable on demand or at a fixed or determinable future time. 4th, Payable to order or bearer. 5th, Addressed to a drawee, he is named with reasonable certainty. Act 1, Sec. 1, Negotiable Instruments Act, 1901.

In a case very much similar to the one at bar, tried in the Supreme Court of Mass. it was held: "That a bill or note made without consideration. or lost or stolen and afterwards negotiated to one having no knowledge of these facts, for a valuable consideration and in the usual course of business his title is good, and such holder shall be entitled to receive the amount of the note." John Wheeler vs. Albert H. Guild, 20 Pickering 545, citing to the same effect; Miller v. Race, 1 Burk 452: Peacock vs. Rhodes, 2 Douglas 633; Grant vs. Vaugn, 3 Burr 1576. And to the same end we have the case of Stoddard vs. Burton 41 Ia. 582.

That Harmon is a holder in due course is seen from the statutory requirements: 1st, That note be complete and regular upon its face. 2nd, That he became the holder of it before it was overdue, and without notice that it had been previously dishonored if such was the case. 3rd. That he took it in good faith and for value. 4th, That at the time it was negotiated to him he had not notice of any infirmity in the instrument or defect in the title of the person negotiating it. Art. IV, sec. 52, Negotiable Ins. Act, 1901.

Judgment for the plaintiff.

OPINION OF THE SUPERIOR COURT.

It is not distinctly ascertained whether the warrant of attorney to confess judgment, was a warrant to confer prior to the maturity of the note, or not. As judgment was in fact entered before maturity, we shall assume that the warrant authorized it.

Prior to the negotiable instrument act of 1901, a rule with a warrant of

attorney was held to be not negotiable, by Chief Justice Gibson. Overton v. Tyler, 3 Pa. 346. In that case the warrant was at once to confess judgment, and judgment was conferred before maturity. The act of 1901 enacts that a rule that otherwise would be negotiable, shall not be made non-negotiable by the fact that it "authorizes a confession of judgment, if the instrument be not paid at maturity," but this language does not apply to a warrant to confession of judgment, before maturity. Milton Nat. Bank v. Beaver, 25 Super. 494. The note in suit is therefore non-negotiable. It follows that the payment by Kelso to Addison was a good payment. Kelso could not be obliged to pay that sum again.

It follows also, that Harmon cannot, in his own name, sue for even the $200 still unpaid.

The note had been deposited in the prothonotary's office and a judgment had been in fact confessed upon it. The note then *transit in rem judicatam.* it was merged, in the judgment, that is, it ceased to have any legal existence; Overton v. Tyler, 3 Pa. 346; Jones v. Johnson 3 W. & S. 276; Murray v. Weigle, 118 Pa. 159; Hartman v. Ogborn, 54 Pa. 120. The fact that the paper on which it was written, was taken from the prothonotary's office, and negotiated to the plaintiff, did not recall it to legal life. It remained dead. No action can be sustained upon it. *Interest republicae ut sit finis letium.* For any fraud practiced as Harmon in selling him, as a valid security, that which had become legally void, he must resort to another remedy. Kelso is not responsible for it. To make him liable in the action, would make him an innocent person the indemnitor of Harmon. This must not be allowed.

Judgment reversed.

BOOK REVIEW.

The Law of Crimes. By John Wilder May, Little, Brown & Co.

This work is too well known, and its merits have been too well appreciated to require more than a brief notice. For many years it has been the favorite text book in law schools and among office students of the law. The new edition, prepared by Mr. Bigelow of the Law School of the University of Chicago, enhances very appreciably the merits of the work. The number of pages is not materially increased, but they are larger. Substantially the same arrangement is preserved. The preliminary part of the work, devoted to "general principles" is admirable. Several of the crimes are treated with exceptional clearness; a good sketch of the distinction between attempt, preparation and intent is given at page 165. The chapter on Criminal Procedure is clear and sufficiently full for a general elementary work. The book can be unreservedly commended to lawyers and to students of law. One is not worthy of the name of lawyer, eschew criminal practice as he will, who does not become acquainted with substantially all that this book exhibits, concerning criminal law.

The Law of Bailments. By James Schouler; Little, Brown & Co.

James Schouler is too well known, as historian, essayist, law lecturer and law text book writer, to require more than mention of the fact that a text book of convenient size, on the subject of Bailments, has been prepared by him for the use of law students and lawyers. It is based on his larger work and upon notes by him in his lectures as law professor. The type is large and beautiful, the paper of excellent quality. In 400 pages, a summary of the whole law is presented. Over 60 pages are devoted to the topic of Carriers of Passengers. An interesting chapter of 20 pages, is given to the subject of Connecting Carriers. The law of bailments has undergone an immense development in modern times, and its importance augments daily. Informed with the contents of this book, the student or lawyer is prepared to advance his knowledge of the details of any department of the subject, with care and a sense of security. One can recommend this book with no misgivings. It will bear testing.